

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DUONE MORRISON,

Petitioner,

– *against* –

WILLIAM F. KEYSER,

Respondent.

**ORDER**

20 Civ. 4398 (ER)

RAMOS, D.J.:

On June 5, 2020, incarcerated *pro se* litigant Duone Morrison filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 seeking release from custody due to the conditions at Sullivan Correctional Facility during the COVID-19 pandemic. Doc. 1. On August 24, 2020, Respondent submitted a motion to dismiss the petition. Doc. 13. The case was then stayed on September 4, 2020 as Morrison sought to exhaust his state habeas claim in state court. Doc. 18. In a letter dated December 27, 2021, Morrison informed the Court that the Third Department had dismissed the appeal of his denied state habeas claim on June 17, 2021 due to the fact that Morrison had been transferred to a different correctional facility, mooted his claim. Doc. 22. Morrison received notice of entry of this decision on August 3, 2021. Doc. 23 at 5. Morrison thus requested that the stay be lifted and that he be permitted to amend his petition. Doc. 22. Respondent then submitted a letter on January 5, 2022 arguing that the stay should be lifted and the case dismissed because the petition became moot in light of Morrison’s transfer to a different facility and Morrison failed to exhaust his state court remedies by not seeking leave to appeal the Third Department’s decision.

The Court agrees with Respondent. State remedies must be exhausted before a federal court may grant a federal habeas claim. 28 U.S.C. § 2254(b)(1)(A) (“An application for a writ of

habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State”). If the petitioner receives an adverse state appellate court decision, “he should then seek leave to appeal to the New York Court of Appeals, the highest New York State court.” *See Simpson v. Keyser*, No. 20 Civ. 6408 (AJN), 2020 WL 5946944, at \*3 (S.D.N.Y. Oct. 7, 2020).

Here, Morrison received notice of entry of an adverse state appellate court decision on August 3, 2021. Doc. 23 at 5. Morrison’s deadline to seek leave to appeal that decision was 35 days later on September 7, 2021. *See* C.P.L. § 460.10(5); C.P.L.R. 5513(d); C.P.L.R. 2103(b)(2), (c) (requiring an appeal within 30 days with 5 additional days if service is by mail). Morrison did not seek leave to file such an appeal and is now barred from doing so. “When a petitioner can no longer present his unexhausted claim of trial error to the state courts, we deem the claim procedurally barred. Because [the petitioner] shows no cause for or prejudice from the failure to raise the claim, and failing to consider it will not result in a fundamental miscarriage of justice, his claim cannot proceed.” *Richardson v. Superintendent of Mid-Orange Corr. Facility*, 621 F.3d 196, 201–02 (2d Cir. 2010) (internal quotation marks and citations omitted); *see also Lithgow v. Keyser*, No. 20 Civ. 3655 (VEC) (RWL), 2021 WL 4200722, at \*4 (S.D.N.Y. Aug. 16, 2021), *report and recommendation adopted*, No. 20 Civ. 3655 (VEC), 2021 WL 4391122 (S.D.N.Y. Sept. 24, 2021) (dismissing federal habeas claim where petitioner did not appeal to the highest court in the state before the deadline).

For these reasons, the stay is lifted and Morrison’s petition for habeas corpus is dismissed. The Clerk of Court is respectfully requested to terminate the case and mail a copy of this Order to the petitioner.

It is SO ORDERED.

Dated: January 6, 2022  
New York, New York

A handwritten signature in blue ink, appearing to read 'Edgardo Ramos', is positioned above a horizontal line.

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Edgardo Ramos, U.S.D.J.